Supreme Court, U. S.
FILED
FEB 25 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1319

JOSHUA POMERANTZ,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JULIA PAMELA HEIT, P.C.
Attorney for Petitioner
405 Lexington Avenue
New York, New York 10017
(212) 687-4700

2995 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Reasons For Granting the Writ:

I. Petitioner's responses before the New York grand jury concerning acts in New Jersey were elicited from him in direct violation of his Fifth Amendment privilege against self-incrimination, since New York State had no authority to grant him immunity from prosecution under New Jersey laws, and since petitioner never voluntarily and intelligently waived his privilege in regard to any matter arising in the State of New Jersey. 6

II. Since petitioner had a constitutional right to consult with his attorney upon his request outside the grand jury room, the prosecutor's failure to permit him to consult with counsel must be deemed to have tainted the ensuing indictment. 13

III. Since the prosecutorial intent in calling petitioner before the grand jury was to set a perjury trap rather than glean legitimate information from him, his resulting perjury conviction offended the Due Process requirement of the Fourteenth Amendment.. 16

Conclusion 23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Bronston v. United States, 409 U.S. 352 22

Brown v. United States, 245 F.2d 549 (8th Cir. 1957) 22

Counselman v. Hitchcock, 142 U.S. 547 (1892) 6

Kastigar v. United States, 406 U.S. 441 (1972) 7

Kirby v. Illinois, 406 U.S. 682 (1972) 9

Manes v. Meyers, 419 U.S. 449 (1975) 9

Masina v. United States, 296 F.2d 871 (8th Cir. 1961) 22

Miranda v. Arizona, 384 U.S. 463 (1966) 9

Murphy v. Waterfront Commission, 378 U.S. 52 (1964) 7

People v. DiSalvo, 32 N.Y. 2d (1973) 15

People v. Ianiello, 21 N.Y. 2d 418 (1968) 14

People v. Lev, 91 Misc. 2d 241 (Sup. Ct., Bronx Co. 1977) . 15

People v. Pomerantz, 63 A.D. 2d 464 ..... 11, 16, 17

People v. Renayhein, 40 A.D. 2d 153 (1st Dept. 1972) 15

People v. Ward, 37 A.D. 2d 174 (1st Dept. 1971) 15

Roche v. California, 342 U.S. 165 17

Contents

Page

Sorells v. United States, 287 U.S. 435 17

United States v. Blue, 384 U.S. 251 (1966) 6

United States v. Calandra, 414 U.S. 338 (1974) 8

United States v. Calandra, 465 F.2d 1218 (6th Cir. 1972) ... 16

United States v. Camporeale, 515 F.2d 184 (2d Cir. 1974) .. 20

United States v. Mandujano, 425 U.S. 564 (1976) 6, 11, 16

United States v. Philips, 540 F.2d 319 (8th Cir. 1976) 22

United States v. Russell, 411 U.S. 423 .....17, 18

United States v. Wade, 388 U.S. 218 (1967) 9

Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) 7

Statute Cited:

28 U.S.C. Section 1254(1) 2

United States Constitution Cited:

Fifth Amendment 2, 6, 8, 9, 12

Sixth Amendment 2, 12, 13

Fourteenth Amendment 2, 3, 13, 16

Contents

Page

APPENDIX

Appendix A — Order of United States Court of Appeals ... 1a

Appendix B — Order of United States District Court For the Eastern District of New York 2a

Appendix C — Opinion of the New York Court of Appeals . 14a

Appendix D — Opinion of the Appellate Division, Second Department of the State of New York 26a

In The

Supreme Court of the United States

October Term, 1979

No.

JOSHUA POMERANTZ,

Petitioner,

vs.

STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioner Joshua Pomerantz respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered on November 27, 1979, denying petitioner a certificate of probable cause in order to enable petitioner to appeal from an order of the United States District Court for the Eastern District of New York signed on June 4, 1979 and filed on June 7, 1979, denying his petition for a writ of habeas corpus (Platt, J.).*

* On June 26, 1979, Judge Platt of the United States District Court of the Eastern District of New York denied petitioner's application for a certificate of probable cause.

OPINIONS BELOW

The order of the Court of Appeals is annexed as Appendix A. The opinion of the district court is not officially reported and is annexed as Appendix B. The decision of the New York Court of Appeals, affirming petitioner's conviction is reported at 46 N.Y. 2d 240 (1978) and is annexed as Appendix C. The decision of the Appellate Division, Second Department, reversing petitioner's conviction and dismissing the indictment is officially reported at 63 A.D. 2d 457 and is annexed as Appendix D.

JURISDICTION

The order of the court of appeals was entered on November 27, 1979. No application for an extension of time within which to file this petition has been made. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's responses before the New York grand jury concerning acts in New Jersey were elicited from him in direct violation of his Fifth Amendment privilege against self-incrimination, since New York State had no authority to grant him immunity from prosecution under New Jersey laws, and since petitioner never voluntarily and intelligently waived his privilege in regard to any matter arising in the State of New Jersey.

2. Whether petitioner was deprived of his constitutional right to counsel pursuant to the Sixth and Fourteenth Amendments to our Federal Constitution when the prosecutor, during petitioner's interrogation before the grand jury, refused to allow him to consult with his attorney outside the grand jury chambers.

3. Whether, the tactics of the prosecutor in calling petitioner before the grand jury in order to set the scene for a

perjury trap rather than to obtain legitimate information about possible corruption within its jurisdiction violated even our minimal standards of due process of law under the Fourteenth Amendment to our Federal Constitution.

STATEMENT OF THE CASE

This case presents critical issues concerning the rights of all prospective witnesses, who are compelled to appear before the state grand juries. Since this Court has never fully articulated in constitutional terms the scope of a witnes' right to consult with his attorney outside the grand jury chambers or whether a state's grant of immunity will extend to a sister state, it is imperative that this Court grant certiorari in this case in order to finally resolve these troublesome issues.

On October 19, 1977, petitioner was convicted in the Supreme Court, Kings County of the State of New York, of three counts of perjury in the first degree, and was sentenced to concurrent terms of imprisonment not to exceed three years on each count (Hon. Sybil Hart Kooper at trial and sentence).

On May 21, 1976, petitioner, a vendor to various nursing homes, was called to testify before a Kings County Grand Jury specially empanelled to investigate criminal activity in the nursing home industry in Kings County. Specifically, this grand jury was conducting an enquiry into the relationship between certain vendors (who supplied goods and services to nursing homes) and the owners of these nursing homes, in an attempt to ascertain whether New York State had been defrauded by the improper payment and theft of Medicaid funds.

At the outset of his grand jury appearance, petitioner was advised of the scope of the investigation, and, in particular, of the grand jury's interest "in determining whether there is corruption or abuse of the Medicaid system *here in New York*." Following petitioner's request for immunity, he was specifically informed that he would receive immunity from prosecution. At

no time did the prosecutor inform petitioner that he would be questioned extensively regarding acts emanating in New Jersey, nor was he advised that the grant of immunity in New York did not preclude a criminal prosecution in New Jersey based upon his responses to the prosecutor's queries before this body. Petitioner was then subjected to intensive interrogation concerning every facet of his affairs, and those with whom he did business, both in New York and in New Jersey. He unequivocally denied ever having given an inflated bill, a kickback, or an invoice for goods not delivered.

During the course of his examination, petitioner was questioned whether he had done business with or solicited business from Ira Feinberg at the Manor Nursing Home in New Jersey. Petitioner responded, "Sure, it's possible." However, upon being examined with regard to the 10% inflated bills in conjunction with his meeting with Feinberg, the prosecutor did not confine his inquiry to Feinberg, but included in his one question four other New Jersey nursing home operators. Notably, at no time did the prosecutor provide petitioner with the date of the Feinberg meeting, or ask him the specific question whether on July 15, 1975, he had ever had a discussion with Ira Feinberg at the Manor Nursing Home in New Jersey regarding kickbacks or inflated bills. Instead, it was always petitioner's position that the prosecutor, by asking these generally broad questions, which obviously referred to the Feinberg incident, steadfastly avoided pinpointing the real subject of his inquiry.

Moreover, during his grand jury appearance, petitioner requested permission to consult with his attorney outside the chambers. The prosecutor refused to grant his request and represented that he had only one more question to ask. However, in fact, he asked a series of 23 questions, one of which elicited a reputed perjurious response.

As a result of his testimony before this grand jury, petitioner was charged in a three count indictment with the

crimes of perjury. The gravamen of this indictment charged petitioner with having lied to the special grand jury concerning a one-half hour meeting had 10 months before his grand jury appearance with Ira Feinberg at the Manor Nursing Home in New Jersey.

At the forthcoming trial, petitioner's conviction was predicated solely upon the testimony of Ira Feinberg concerning that one-half hour meeting at the Manor Nursing Home in New Jersey, and a tape recording of that meeting. Feinberg had arranged that meeting with petitioner, since he had previously agreed to become a prosecutorial agent in the expectation of obtaining leniency on his own 18-month federally imposed sentence. Petitioner's appearance there was prompted only by Feinberg's representation that he was seeking supplies for his nursing home which was scheduled to open shortly.

It should be emphasized that petitioner had never followed up on any of his reputed offers to Feinberg, and the prosecutor never produced any evidence whatever that showed petitioner's involvement in any nefarious dealings in the nursing home industry in New York State. As a defense, petitioner claimed that he failed to recollect this one-half hour meeting held 10 months before with Ira Feinberg.

REASONS FOR GRANTING THE WRIT

I.

Petitioner's responses before the New York grand jury concerning acts in New Jersey were elicited from him in direct violation of his Fifth Amendment privilege against self-incrimination, since New York State had no authority to grant him immunity from prosecution under New Jersey laws, and since petitioner never voluntarily and intelligently waived his privilege in regard to any matter arising in the State of New Jersey.

This Court has repeatedly recognized that the one unwavering constitutional limitation placed upon the grand jury's authority to compel testimony is a witness' claim of a Fifth Amendment privilege against self-incrimination. *United States v. Mandujano,* 425 U.S. 564 (1976). In other words, a witness can be required to answer before a grand jury, so long as there is no compulsion to answer questions that are self-incriminating. He is given the unqualified right of standing on his privilege against incrimination until he is assured that the immunization offered by the prosecutor "is as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock,* 142 U.S. 547 (1892). Immunity is the government's tool for securing testimony that otherwise would be protected. Our law has reached the stage where unless immunity is conferred, testimony may be suppressed if it is compelled over an appropriate claim of privilege. *United States v. Blue,* 384 U.S. 251, 255 (1966).

In the present case, petitioner, at the outset of the grand jury proceedings, promptly asserted his claim of privilege, and was thereafter compelled to testify under a grant of immunity, which, unbeknownst to him, did not protect him against prosecution in the State of New Jersey. As defined by our courts, the protection afforded by our constitutional guarantees against compulsory self-incrimination is confined to the giving of testimony which would tend to subject a witness to criminal

liability or to a penalty within the jurisdiction and under the sovereignty in which the privilege is invoked. The law has evolved only to the extent of holding that a state witness may not be compelled to give testimony which may be incriminating under federal laws unless the compulsory testimony, and its fruits, cannot be used by federal officials in connection with a criminal prosecution against him. *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964); *Kastigar v. United States,* 406 U.S. 441 (1972). There is no case which gives the prosecutor of one state the power to confer immunity on a prospective witness for criminal acts committed in a sister state. Thus, at the present time, the privilege against self-incrimination does not extend to protect a witness as to matters which may tend to incriminate him under the laws of a sister state. Accordingly, the immunity offered petitioner before the New York grand jury was not, in reality, co-extensive with the privilege waived.

Ironically, Judge Platt, in denying petitioner's application for a writ of *habeas corpus* aptly recognized the limitation of the *Murphy* holding and stated it would have been preferable if the prosecutor had been required to obtain an agreement of use immunity from the autnorities in New Jersey. Implicit in this statement is the recognition that petitioner's immunity was indeed defective.

Additionally, Judge Platt expressed the concern that a substantial federal question might well have been raised if petitioner had been prosecuted in New Jersey as a result of his testimony before the New York grand jury. However, this question was squarely confronted by this Court in *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472 (1972). There the defendant raised the analagous issue of whether he could be compelled to testify before the Commission because his testimony would expose him to the danger of foreign prosecution, and that his scope of immunity could not protect him against foreign prosecution. This Court found that the defendant's fears of foreign prosecution were only illusory, but did seek to emphasize that if the Commission should inquire

into matters which might incriminate him under foreign law and pose a substantial risk of foreign prosecution, then a constitutional question would squarely be presented. Hence, it is not an *actual* prosecution under the laws of another jurisdiction that would present a constitutional issue, but the real and justifiable fear of prosecution under the laws of the other jurisdiction. Here, the prosecutor's interrogation of petitioner before the New York grand jury concerning acts in New Jersey placed him in the very treacherous position of being exposed to the full force and effect of New Jersey laws if they, too, embarked upon an investigation of the nursing home industry in that State.

Thus, given the state of the law in this area, it was incumbent upon the prosecutor to advise petitioner that he intended to question him regarding this out-of-state matter. Since it was the prosecutor's office that contrived the New Jersey meeting, a modicrum of fundamental fairness demanded that petitioner be alerted to the grave defects in his grant of immunity.

Furthermore, at no time did petitioner make a knowing and intelligent waiver of his privilege against self-incrimination with respect to any criminal act committed in New Jersey. Predicated upon this record, there was no conceivable way that petitioner could have knowingly executed such a waiver, since the prosecutor failed to advise him that his interrogation regarding any incident in New Jersey would expose him to criminal liability in that State. Surely, the functioning of the grand jury would not be impaired by requiring an effective warning and an intelligent waiver by a witness prior to any attempts made by the prosecutor to elicit potentially incriminating information. *United States v. Calandra,* 414 U.S. 338 (1974).

The prosecutor further denigrated petitioner's Fifth Amendment privilege when he refused to permit him to consult with his attorney outside the grand jury chambers. We have reached that point in the law where it is now recognized that the

right to counsel and the privilege against compulsory self-incrimination are rights that are inextricably intertwined. *Kirby v. Illinois,* 406 U.S. 682 (1972); *United States v. Wade,* 388 U.S. 218 (1967); *Miranda v. Arizona,* 384 U.S. 436 (1966). The question of whether the guidance of counsel is required to enable an individual to avoid prejudice in his Fifth Amendment privilege was answered by this Court in *Manes v. Meyers,* 419 U.S. 449, 466 (1975):

> "The assertion of a testimonial privilege, as of many of others, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion."

In this context, Judge Platt's observations on this particular point defies the current standards set by this Court:

> "If petitioner believed that the immunity given to him by the prosecutor was insufficient, he should have refused to answer the questions, put to him on that ground and/or sought clarification with respect to the scope of immunity of the court supervising the grand jury."

We submit that it would be a gross travesty of justice to expect that a layperson could be aware of the sophisticated technical nuances surrounding grants of immunity, especially when he had already been informed by the prosecutor that he was being granted full immunity and was given no reason to suspect otherwise. The prejudice to petitioner was further exacerbated by the prosecutor's refusal to permit him to consult with his counsel. As soon as petitioner requested to consult with

his counsel, the prosecutor was under a duty to immediately cease all interrogation and permit such a consultation to take place. Instead, the prosecutor chose to continue his interrogation and the very next question asked of petitioner elicited a reputed perjurious response. Even more devastating, this charged perjurious response was in answer to a question concerning Ira Feinberg at the Manor Nursing Home in New Jersey. The Appellate Division for the Second Department of the State of New York, in soundly condemning the prosecutorial tactics, declared:

> "Nevertheless, the defendant's conviction must be reversed and the indictment dismissed because he was not given a fair opportunity during the grand jury proceeding to ascertain the scope of his immunity. As is obvious by now, the extent of the defendant's immunity is not a matter free from doubt. Moreover, the Special Prosecutor was fully aware that the question of the extra-state effect of New York's immunity would arise, because the defendant had been 'set up' in New Jersey, with a view towards questioning him in New York. Despite this knowledge, the Special Prosecutor failed to inform the defendant that his immunity would apply to conduct which occurred outside this State. The defendant was obviously confused on this point; during his grand jury testimony, he asked to speak with his attorney immediately after answering a question about Ira Feinberg. Instead of granting the request, the prosecutor discouraged the defendant from seeking legal counsel by stating that there would be only one additional question. This further suggests that the prosecutor was only interested in obtaining a perjury indictment once he had determined that the defendant was lying.

> *In the light of the foreknowledge of the Special Prosecutor that a complex question of privilege would arise as to which no definitive answer existed, it would have been preferable for him to have explained to the defendant the scope of his immunity.* However, as a minimum, the defendant should have been permitted to speak to his attorney immediately upon his request." *People v. Pomerantz,* 63 A.D. 2d 464, 465 (emphasis supplied).

We are hard-pressed to reconcile the New York Court of Appeals' characterization of petitioner's request to consult with his attorney as a mere "[illegible]viality." The use of such terminology in the context of this case is clearly unwarranted, as no court in this modern age has ever so denigrated this critical right to counsel.

Moreover, the New York Court of Appeals' determination was clearly contrary to the standards approved by this Court in *United States v. Mandujano, supra.* As this Court stated:

> "Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law." 48 L. Ed. 2d 212, at p. 225.

Implicit in this statement is the axiom that a witness has the unqualified right, at the very least, to seek counsel's advice outside the grand jury room. Any other interpretation would render meaningless the prosecutorial advice that a witness could seek the assistance of counsel, albeit, not inside the grand jury room. Thus, the cumulative effect of all these circumstances demonstrate unequivocally that petitioner could not possibly have known that his immunity was defective, nor could he have taken those remedial steps set forth by Judge Platt, to clarify his

rights. Despite Judge Platt's inference that petitioner's grant of immunity might very well have been defective, Judge Platt ruled that in any event, petitioner had no license to commit perjury.

While we are well aware that although generally a witness has no license to lie before the grand jury, this axiom of law applies only when the reputed testimony is not compelled in violation of the individual's privilege against self-incrimination. As this Court has stated on so many occasions, the one unwavering limitation placed upon the authority of the grand jury to compel testimony is the privilege against self-incrimination. It is that privilege which was blatantly violated in this case. Moreover, we would point out that this Court has never been confronted with the dual issues raised herein, to wit: that the prosecutor deliberately misled petitioner into believing that he had full immunity when, in fact, he had no authority to grant immunity for any criminal transgression in New Jersey.

Hence, under all the circumstances in this case, it should be found that petitioner's responses before the New York grand jury concerning acts in New Jersey were elicited from him in direct violation of both his Fifth Amendment privilege against self-incrimination, and his Sixth Amendment right to counsel.

We urge that these critical constitutional issues, are substantial and clearly warrant the granting of a writ of certiorari. It should be noted that this is not a case wherein the New York appellate courts were silent on petitioner's claims. Instead, the New York courts had expressed startlingly divergent positions on the issues presented. It is incongruous that both Judge Platt and the United States Court of Appeals for the Second Circuit should deny our application for a certificate of probable cause, thereby denoting the issues as frivolous when five Justices of our State Appellate Division agreed in every instance with petitioner's position.

Accordingly, we urge that this Court grant petitioner a writ of certiorari.

II.

Since petitioner had a constitutional right to consult with his attorney upon his request outside the grand jury room, the prosecutor's failure to permit him to consult with counsel must be deemed to have tainted the ensuing indictment.

The facts of the instant case present the perfect vehicle for this Court to finally clarify the important question of whether a witness, who is summoned before a grand jury, has a constitutional right to consult with his attorney outside the grand jury chambers. It is petitioner's position that a witness, at the very least, has a fundamental right to consult with his counsel outside these chambers whenever he feels the need to seek legal assistance. Any interference with this basic right must be viewed as a denial of the witness' constitutional right to counsel under our Sixth and Fourteenth Amendments of the Federal Constitution.

Before the conclusion of his examination before the grand jury, petitioner for the first time asked permission to consult with his attorney. The prosecutor, however, ignored this request, and merely told petitioner, "One last question." (A99, 100). The very next question in a series of 20 subsequent inquiries elicited an allegedly perjurious response from petitioner and concerned the New Jersey incident. We submit that the moment that petitioner sought his counsel's advice, the prosecutor had an obligation to cease his interrogation and permit him to speak to his counsel. The prosecutor's failure to accord petitioner this rudimentary right constituted an outright violation of his Sixth Amendment right to counsel, and tainted the ensuing indictment. In this application, we have raised the serious issues regarding petitioner's privilege against self-incrimination (Point I), and the question of whether the New Jersey incident was indeed relevant to the grand jury's investigation (Point III). Ironically, the very next question posed to petitioner after his request to see his counsel concerned these issues.

In this light, it cannot be assumed that petitioner's request to see his counsel was made in bad faith, or with the intention of delaying or hindering the grand jury proceedings. He cannot be accused of constantly interrupting his examination to consult with his lawyer. This was his only request, and it should not have been denied. While petitioner did not articulate the reasons for his request, we cannot speculate that his request was not premised on his need to ask for the aid of counsel for a proper matter such as the immunity question. Petitioner clearly did not understand that his request to see his counsel would be honored only if he uttered the correct verbiage.

New York law regarding a witness' right to consult with his attorney is set forth in *People v. Ianiello,* 21 N.Y. 2d 418 (1968). There the court stated, "Whenever a witness demands to see his lawyer for counselling concerning his legal rights (as opposed to mere strategic advice), he should be given the opportunity to do so." 21 N.Y. 2d at p. 425. However, while acknowledging that a witness does have a right to consult with counsel, the court failed to ensure that the witness was aware of the procedure to be followed in order to invoke his right to see counsel. In this connection, the court stated:

> "If his right is denied, however, he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecution to take the matter into open court for a ruling. By requiring the matter to be taken to the presiding Justice, the proceedings are expedited and the danger of stalling tactics is reduced." 21 N.Y. 2d at p. 425.

Once it is recognized that a witness has a right to consult with his attorney, it is imperative that the witness be advised of how such a consultation can be effected. Otherwise, his rights in this critical area, in reality, are non-existent. Clearly, a witness, such as petitioner, who for the first time in his life is called as a witness before the grand jury, and who has no familiarity with

the intricacies of these legal proceedings, cannot possibly know how to invoke his rights in order to protect himself before this body. He does not know on which particular ground he must or can object to questions. He does not know, as here, whether his grant of immunity may be defective. He is a layman — totally ignorant of these sophisticated legal nuances. While his attorney may have given his client some preliminary advice before entering the grand jury, the attorney is of no assistance once his client enters those chambers, since he does not have knowledge of the nature of the questions that will be posed to his client. The courts cannot expect a witness to suddenly assume the role of a lawyer in asserting these rights. Nor can the courts expect a layman to attempt to "buck" the apparent authority of the prosecutor in front of this awesome body and refuse to answer his inquiries. Compelling a witness to enter the grand jury chambers alone to be confronted with a barrage of questions in and of itself has an intimidating effect. If New York courts insist on following this procedure, they then must also insist that the prosecutor warn the witness at the outset of these proceedings precisely what he must do to invoke his right to consult with counsel. It is offensive to any concept of due process for the courts to admit that a witness does have a right to consult with counsel, but then preclude him from exercising this right by not advising him how to effectively invoke it.

It is unfortunate that in New York State it depends only upon the whim of the prosecutor whether or not a witness will be permitted to consult with his attorney (*People v. DiSalvo,* 32 N.Y. 2d 1973) (where witness at one point was permitted to consult with counsel); *People v. Renayhein,* 40 A.D. 2d 153 (1st Dept. 1972) (where defendant accorded right to consult with attorney); *People v. Ward,* 37 A.D. 2d 174 (1st Dept. 1971) (wherein the appellate division held that a witness is entitled, on demand, to see his lawyer for counselling regarding his legal rights); *People v. Lev,* 91 Misc. 2d 241 (Sup. Ct., Bronx Co. 1977) (where defendant in a case similar to the one at bar was permitted to consult with his attorney). Our own Southern and Eastern Districts of New York freely permit a witness to leave

the grand jury room and consult with his attorney. *See also, United States v. Calandra,* 465 F.2d 1218 (6th Cir. 1972). Thus, it is evident that the availability of the critical right to counsel depends only on the fortuitous circumstance of which courthouse the witness finds himself. It is time that this Court finally articulated such a right in constitutional terms, so as to assure the equal application of justice for all witnesses who must appear before these clandestine bodies.

While this Court in *United States v. Mandujano, supra,* has implied in *dicta* that a witness before a grand jury has a right to counsel outside the grand jury chambers, this statement has never received the endorsement of a constitutional mandate. In order to crystalize a witness' rights before a grand jury, we urge that this Court grant certiorari in the instant case.

III.

Since the prosecutorial intent in calling petitioner before the grand jury was to set a perjury trap rather than glean legitimate information from him, his resulting perjury conviction offended the Due Process requirement of the Fourteenth Amendment.

Called as a witness before the Special Grand Jury in Kings County, petitioner was questioned in an undisputedly oblique manner about his meeting at the Manor Nursing Home with Ira Feinberg, an agent for the Special Prosecutor's office. The resulting perjury indictment against him was based upon information emanating from this one-time, half-hour New Jersey encounter. As the Appellate Division for the Second Judicial Department so cogently found, "(A) review of the record indicates that the Grand Jury interrogation of the defendant served no legitimate law enforcement objective; the only conceivable purpose for this transaction and subsequent interrogation was to set the stage for a perjury prosecution." *People v. Pomerantz,* 63 A.D.2d 447, 462 (2d Dept. 1978). Thus, in this case, we are concerned with that "excess of prosecutorial zeal" which strikes at the heart of our most rudimentary

concepts of fundamental fairness and due process. *People v. Pomerantz, supra,* at p. 460. *See also, United States v. Russell,* 411 U.S. 423; *Sorells v. United States,* 287 U.S. 435; *Roche v. California,* 342 U.S. 165. The true test of whether the Special Prosecutor's office exceeded the bounds of fair play can only be determined by a thorough review of the chronology of events. The resulting composite picture will unequivocally establish that petitioner's conviction cannot stand.

The stage was being set for this perjury indictment as early as July 15, 1975 when Ira Feinberg, who had previously agreed to become a prosecutorial agent in the expectation of obtaining leniency on his own 18-month federally imposed sentence, had arranged a meeting with petitioner at the Manor Nursing Home in Emerson, New Jersey. Petitioner's appearance there was prompted only by Feinberg's representation that he was seeking supplies for his nursing home which was scheduled to open shortly.

Although Feinberg vigorously denied that he was instructed to entice anyone into making these nefarious agreements, the tape recorded conversations between petitioner and Feinberg flatly belie this conclusion. The tapes reveal that this prosecutorial agent actually had to prod petitioner into a discussion of this nature. Each time Feinberg brought up the question of available "deals," petitioner steadfastly ignored him, by turning the topic of conversation to some inane subject such as the quality of his soup bowls. Petitioner simply did not evince any interest in Feinberg's attempts to involve him in any illicit discussions. It was only after Feinberg's *ninth* prodding that petitioner reluctantly relented. Clearly, this is not the characterization of a man who was eagerly awaiting his chance to jump into an illicit arrangement. Rather, it would appear that Joshua Pomerantz responded precisely as one would expect a salesman to react if he did not want to close the door on a potentially good account, and had been induced to enter a discussion only after the repeated prodding of a prospective

customer. Given these circumstances, Feinberg's persistent and unrelenting efforts to provoke petitioner to discuss these deals smacks of the classic entrapment situation. *United States v. Russell, supra.*

While there is nothing inherently evil regarding the prosecution's use of an undercover agent, our courts cannot condone the use of an agent whose sole function is to entice an individual into making incriminating statements with the view towards later calling him before the grand jury to interrogate him regarding these reputed admissions. Such tactics, in essence, transform the grand jury, an arm of the court, intended to fulfill the dual obligation of fairness and neutrality, into a tool of the prosecutorial branch of government, to be employed as an integral part of its undercover operations. In short, the grand jury was not created to be subverted to any type of manipulative use by the Special Prosecutor's office, in their zeal to ferret out crime.

That the Special Prosecutor's office so intended to improperly invoke the powers of the grand jury to assist them in their undercover activities is clearly demonstrated by the events that unfolded subsequent to the Feinberg meeting.

Despite the fact that the Special Prosecutor's office was well aware of all that had transpired during this meeting, they deliberately chose to delay questioning petitioner about this incident before the grand jury until 10 months had elapsed. No reason appears on the face of this record to explain this undue delay, since petitioner's motion for a pre-trial hearing on this issue was opposed by the prosecution, and denied by the court. The prosecution was in possession of the tape recordings of this meeting, and there is no indication that there existed any further proof that even suggested any wrongdoing or corruption on petitioner's part prior to his grand jury appearance. The record is clear that petitioner, at no time, had any dealings with Feinberg, other than this one 30-minute meeting. Nor did petitioner ever again attempt to contact Feinberg to follow up on this possible account.

Hence, it is evident that the primary purpose of this lengthy delay was to place sufficient time between the New Jersey incident and petitioner's grand jury appearance so as to seriously impede his memory before this body. Indeed, petitioner testified that this 10-month gap caused him to forget this single half-hour meeting with Feinberg. As petitioner's lack of ability to recall these past events before the grand jury did result in dire consequences to him, any significant, or unexplainable, delay in calling him before this body to testify to these long past events must be deemed to have caused him irreparable prejudice.

That the prosecutorial intent here was to set the scene for a perjury indictment is further evidenced by the proceedings actually conducted before the grand jury. While respondent in the state courts attempted to convey the impression that petitioner was treated with scrupulous fairness during his grand jury appearance, a mere perusal of the grand jury proceedings will negate this self-serving declaration.

Although petitioner was indeed admonished that he would receive immunity from prosecution on any substantive offense he might reveal, he was never advised that this offer of immunity did not protect him against any crimes committed in New Jersey *(see* Point I). The scope of petitioner's immunity was never fully explained, despite the fact that the prosecutor was well aware that he intended to interrogate petitioner regarding acts emanating in New Jersey. Moreover, the prosecutor misled petitioner into believing that he was to be questioned only regarding possible Medicaid abuses in this State, when he emphasized that this was the objective of the grand jury's investigation (A29). Petitioner was never advised that the core of his interrogation concerned only one particular nursing home in New Jersey. Even the prosecutorial warning that they possessed information that petitioner himself may have been involved in the illicit activities which the grand jury was investigating, was equally misleading. Since petitioner was specifically advised that the grand jury was investigating Medicaid abuses *in New York State,* this representation

insinuated that the prosecutor then possessed information that petitioner had been engaging in the very illicit activities which the grand jury was then investigating. However, the reality was that there existed no proof whatsoever that petitioner had ever committed any illegal act, or discussed the commission of the same in New York State. And finally, but most egregious, the prosecutor refused to allow petitioner to consult with his attorney upon his request (*see* Points I and II). Consequently, these so-called admonishments by the prosecutor were not truly geared to give petitioner comprehensive advice regarding the grand jury proceedings. Rather, the prosecutor's misleading caveats failed to meet those minimal procedural requirements which should be afforded to every prospective witness appearing before a grand jury.

Respondent also in the state courts raised the claim that the prosecutor made every effort to get petitioner to tell the truth. If the prosecutor was genuinely seeking the truth, rather than a perjury indictment, it was at least incumbent upon them to make some sincere effort to refresh his recollection before the grand jury, especially when he evinced difficulty in remembering the Feinberg encounter, and there existed a 10-month unexplained delay in calling him before the grand jury for the obvious purpose of questioning him about this single incident. Yet at no time did the prosecutor advise petitioner that they possessed information that he, in fact, had been at the Manor Nursing Home in New Jersey, nor did they confront him with any of the tape recorded conversations (*see United States v. Camporeale,* 515 F.2d 184 (2d Cir. 1974).

Certainly, the prosecutor, who is armed with detailed information concerning the subject of his interrogation, has an obligation to ferret out the truth, and should be required to make a *bona fide* effort to refresh a witness' recollection when his inquiries elicit responses which differ from his investigatory sources. The prosecutor's failure to make any such effort in this direction must be viewed as a clear indication of his intention to fortify his perjury trap.

Furthermore, the prosecutor's reputed efforts to elicit the truth from petitioner were, at best, illusory. The very nature of the questions posed to petitioner necessarily defeated this objective. The prosecutor deliberately camouflaged his questions by asking for only general information, and he continually refused to pinpoint any particular incident.

Even more offensive was the manner in which the prosecutor questioned petitioner regarding the Manor Nursing Home, the subject of the instant indictment. After first inquiring about a number of nursing homes and their respective owners in New Jersey, the prosecutor then centered his inquiry on whether petitioner had ever done business, or solicited business from the Manor Nursing Home in New Jersey (A60-63). Petitioner answered that he did not recall, but when asked if it were possible that he had ever met Ira Feinberg, petitioner immediately answered "Sure, it is possible." (A63). At that point, the prosecutor questioned petitioner about four other New Jersey nursing homes before returning to the subject of Ira Feinberg at the Manor Nursing Home (A63-65). Petitioner never denied meeting Feinberg, but again insisted that it was possible that he had solicited business from him. However, when inquiring about the 10% inflated bill, the prosecutor lumped all the New Jersey home owners together, and this list of names included Jack Rosen, Joseph Cohen, Andor Glattstein, and Ira Feinberg (A97-98, 100).

If the prosecutor were legitimately seeking information regarding what had transpired at this single meeting at the Manor Nursing Home between petitioner and Feinberg, and hoped to use this information to aid the grand jury in its investigation, it is incomprehensible that the prosecutor never once gave petitioner the date of this meeting; he never once asked petitioner directly whether, on July 15, 1975, he had a discussion with Ira Feinberg regarding the subject of inflated bills; and he never once narrowed his scope of inquiry regarding illegal nursing home practices, but asked only general and broad questions, deliberately omitting any hint that these alleged

incidents *all* concerned that single meeting. We know of no perjury case wherein the subject of the inquiry was not, at the very least, given the date and the specifics of the information sought. Instead, the prosecutor's roundabout mode of interrogation was designed not to elicit the truth, but to confuse petitioner, and to pull the perjury trap closed. *Bronston v. United States,* 409 U.S. 352.

Ironically, this is one of those rare cases wherein we do not need to resort to speculation to ascertain the prosecutorial intent. The prosecutor, in a fatal slip of the tongue, admitted in his summation that this was the case — "That, ladies and gentlemen, is the entire basis for why Joshua Pomerantz was before the jury. It certainly was to trap Joshua Pomerantz and to get knowledge about what he did," (A811).

It is submitted that the summoning of a defendant before the grand jury with the sole intent of trapping him into committing the crime of perjury constitutes such gross prosecutorial misconduct that the grand jury must be deemed to have exceeded its authority and the answers of a defendant, even if false, cannot form the basis for a prosecution for perjury. *Brown v. United States,* 245 F.2d 549 (8th Cir. 1957); *Masina v. United States,* 296 F.2d 871 (8th Cir. 1961); *United States v. Philips,* 540 F.2d 319 (8th Cir. 1976).

Further, there exists even far more compelling reasons to condemn the prosecutorial tactics in this case than those which existed in the federal cases. First, it would be improper to compare the scope of a federal grand jury's investigatory powers with those of the states, since the latter is necessarily more restrictive. In order to establish a federal violation, it is often necessary for a federal grand jury to establish the existence of a criminal act in another state, since federal jurisdiction is often dependent upon this diversity. However, even if Medicaid abuse ran rampant in the State of New Jersey, and even assuming that petitioner had been peripherally involved in these activities in that State, this proof would still not be sufficient to sustain, or

even infer, a finding that the New York laws had been similarly violated. Second, and even more important, the sanctioning of state grand jury investigations which extend into other states presents the very real problem of defective grants of immunity *(see* Point I). Of course, the federal courts are not confronted with the constitutional impact of this troublesome issue.

Thus, we urge this Court both to censor the prosecutor's conduct in setting this perjury trap, and to curb deliberate over-reaching of the state grand juries when these bodies exceed their authority. Accordingly, petitioner's application for a writ of certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

JULIA PAMELA HEIT
Attorney for Petitioner

APPENDIX

APPENDIX A — ORDER OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of November, one thousand nine hundred and seventy-nine.

JOSHUA POMERANTZ,

Petitioner-Appellant,

v.

STATE OF NEW YORK,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the petitioner by notice of motion dated July 1, 1979 for a certificate of probable cause be and it hereby is *DENIED* on the ground that the issues raised are without merit. The appeal is *DISMISSED*.

s/ William H. Timbers
William H. Timbers

s/ Ellsworth A. Van Graafeiland
Ellsworth A. Van Graafeiland

s/ Jon O. Newman
Jon O. Newman

Circuit Judges

APPENDIX B — ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSHUA POMERANTZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

79 Civ. 353

MEMORANDUM AND ORDER

May 30, 1979

PLATT, D.J.

By Order to Show Cause dated February 13, 1977, returnable February 15, 1977, petitioner sought a stay of execution of the sentence imposed upon him on October 19, 1977, by the Supreme Court, Kings County, (Kooper, J.) and the setting of a reasonable bail pending a final determination of his petition for a writ of habeas corpus but, after a hearing, in a brief oral opinion from the bench this Court denied petitioner's application for a stay and bail and thereafter on March 2, 1979, a certified copy of the judgment of the Court of Appeals for this Circuit, affirming this Court's decision, was filed in the Office of the Clerk of this Court.

Respondent now moves for an order dismissing petitioner's petition for a writ of habeas corpus upon the ground that the

Appendix B

petitioner failed to establish therein that execution of the judgment of conviction rendered against him in the Supreme Court will be in violation of the Constitution or laws or treaties of the United States.

The facts in this case are succinctly summarized in the opinion of the New York Court of Appeals dated December 20, 1978,[1] reversing the Appellate Division, Second Department,[2] as follows (46 N.Y.2d at 240):

> "In connection with the investigation of nursing home operators and their suppliers, the Special Prosecutor discovered widespread scandalous abuse of the Medicaid reimbursement program. One common scheme was for suppliers to provide customers with inflated or fictitious bills to cover 'kickbacks'. Although full Medicaid reimbursement would be claimed and received by the home, the overpayment made by the home to the supplier would eventually be shared by the perpetrators.
>
> "To further the investigation the prosecutor enlisted one Ira Feinberg, then recently convicted in federal court on charges of securities fraud and conspiracy. It was agreed that Feinberg, an owner of nursing homes, would invite several supply companies to the newer of his two New Jersey facilities. The true purpose of the meetings

---

1. *People v. Pomerantz*, 46 N.Y.2d 240 (1978).

2. *People v. Pomerantz*, 63 A.D.2d 457 (2d Dept. 1978). Following the decision of the Court of Appeals the Appellate Division, Second Dept., affirmed the petitioner's conviction ——A.D.2d——(1979). Motion for reargument on reconsideration, den'd, 46 N.Y.2d 940 (1979).

was to discover involvement by suppliers in illegal kickback schemes in New York State.

"The Pomerantz Paper Corp. of Brooklyn, of which defendant is president, has been supplying nursing homes with paper goods and household chemicals since 1971. Defendant's company does business with more than 30 homes, the majority located in the New York City metropolitan area. It also has about eight customers in New Jersey. At the invitation of Feinberg, defendant visited Feinberg's Manor Nursing Home in Emerson, New Jersey, on July 15, 1975.

"Following a discussion of the products needed, defendant was asked about 'special deals'. Although he first skirted the subject, defendant ultimately described an 'arrangement' whereby a 'certain percentage [is] put onto the bill'. Offering to 'work something out' with Feinberg, defendant conceded that he would favor Feinberg with benefits he was conferring on others. The conversation was surreptitiously recorded.

"On March 1, 1976, a special grand jury was empaneled in Kings County to investigate nursing home corruption. Of particular interest was the extent to which suppliers were giving kickbacks. Defendant was called to testify on May 21, 1976, ten months after his meeting with Feinberg. On his own request, he was granted immunity.

"After some inquiry into defendant's personal background and the operation of his

company, the prosecutor had defendant list the nursing homes he serviced and the particular persons with whom he dealt. Questions about other homes and persons connected with them followed. With respect to Feinberg defendant was asked:

Q. Have you ever done any business or solicited any business from the Manor Nursing Home in Emerson New Jersey?

A. I don't remember.

Q. That is run by a Mr. Ira Feinberg?

A. I don't recall.

Q. Have you ever met Mr. Feinberg?

A. I don't remember.

Q. Mr. Feinberg also runs the Manor Nursing Home in Tenafly New Jersey?

A. I don't know where Tenafly is.

Q. Well, have you ever met Mr. Feinberg?

A. I don't remember.

Q. Is it possible?

A. Sure, it is possible.

A few other names were mentioned, but the questioning returned to Feinberg:

Appendix B

Q. Once again I want to ask you whether you have ever met or solicited business from Mr. Ira Feinberg who had or has nursing home interests in among others the Manor Nursing Home at Tenafly, New Jersey, and the Manor Nursing Home in Emerson, New Jersey?

A. I don't remember, I don't remember, the name does not strike – the name, I don't remember the name.

Q. Is it possible?

A. It is – sure, it is possible.

Q. Well, how likely is it?

A. I don't know.

Q. Do you have any recollections at all of meeting Mr. Ira Feinberg?

A. None at all. I don't know where those places are.

"Defendant's familiarity with kickbacks was the object of extensive examination. Defendant denied not only participating in wrongdoing, but asserted that he had only newspaper knowledge. The following are but a few examples among many:

Q. Have you ever heard of or do you have any personal knowledge of the alleged practice in the nursing home industry of vendors inflating their bills to nursing homes?

Appendix B

A. Just what I read in the papers.

Q. You have no personal knowledge of that practice?

A. No, sir.

Q. You have never engaged in that practice yourself?

A. No, no sir.

Q. Have you ever heard of or do you have any personal knowledge of the alleged practice in the nursing home industry of vendors giving extra bills or invoices to nursing homes?

A. Just what I read in the paper.

Q. You have never engaged in that practice yourself?

A. No.

* * *

Q. I want to be very clear on this, to the best of your knowledge has any nursing home owner, operator, administrator, or other employee that you have solicited business from ever in words or substance requested or asked you for any special deals so that he can make a few dollars?

A. I cannot remember every person who I dealt with in business if that ever came across.

Q. Mr. Pomerantz, have you ever said, suggested, or told any nursing home owner, operator, administrator, or other employee in words or substance that he can have 10% added onto his bills?

A. You've asked me the question four times already.

Q. Please answer. This will be the last time in that form at least.

A. I must say I don't recollect ever having offered anyone in anyway any type of kickback.

* * *

Q. Have you ever said, suggested, or acknowledged in any way to any nursing home owner, operator, administrator, or other employee that you would add on 10% to their bills and then give them back the 10% in cash?

A. I cannot recall making such a statement.

Q. If you had made such a statement you would recall it, would you not?

A. I sure would.

* * *

Q. I want you to listen to my questions very carefully because they are different. Have you ever told any nursing home owner, operator, administrator, or other employee in effect that you give other people in the nursing home industry 10% inflated bills?

A. To the best of my recollection I don't remember ever making such a statement.

Q. Have you ever said, suggested, or told any nursing home owner, operator, administrator, or other employee that when you make such deals it is on that basis, meaning on the basis of a 10% inflated bill?

A. To the best of my recollection I don't remember making such a statement.

In the last effort, the prosecutor raised Feinberg's name for the third time, and, consistent with his earlier responses, defendant said he did not recall meeting him.

"At one point in the questioning defendant asked to speak to his lawyer. The prosecutor indicated he had only one further question. Although more than twenty questions followed, defendant did not repeat the request. Finally, before concluding, the prosecutor warned defendant he could be indicted for perjury, but defendant declined the invitation to change his testimony.

"A three-count indictment for perjury in the first degree resulted. Count one charges defendant with falsely denying knowledge of kickbacks; the thrust of count two is that defendant falsely stated he never discussed kickbacks with operators; and count three relates to defendant's statements that he had never offered to arrange a kickback scheme.

Appendix B

> "At trial the principal witness for the People was Feinberg. Defendant explained his grand jury testimony about Feinberg as a lapse in memory. According to defendant, with the exception of Feinberg, he had never offered kickbacks to an operator. He only 'play[ed] along' with Feinberg so as not to 'turn him off'."

Following his jury trial, petitioner was convicted on three counts of perjury in the first degree (N.Y. Penal Law § 210.15) and was sentenced to indeterminate concurrent terms of three years on each count. As indicated thereafter petitioner obtained a reversal and dismissal of the indictment from the Appellate Division, Second Department, which decision was then reversed by a New York Court of Appeals, and his conviction was then affirmed by the Appellate Division.

On this motion petitioner argues that (i) the immunity he received when questioned before the New York Grand Jury was not sufficient to protect him from prosecution in New Jersey; (ii) he was illegally deprived of his right to leave the grand jury room and consult with his attorney, and (iii) the prosecutor improperly trapped him into committing perjury. While petitioner failed to raise any of these issues at the trial court level he did argue them in the appellate courts of New York and respondent does not contend that petitioner has failed to exhaust his State remedies.

As indicated above, petitioner was called to testify on May 21, 1976 before the Kings County Special Grand Jury and on his own request he was granted immunity and thereafter was questioned about a conversation in which he participated in New Jersey. Petitioner now argues that truthful responses to these questions could have subjected him to prosecution in New Jersey in violation of his privilege against self-incrimination "since New York State had no authority to grant immunity from prosecution under New Jersey laws . . . (Petition at 3).

Appendix B

There is no longer any dispute that even though he had been granted immunity, petitioner repeatedly lied before the grand jury. This was impermissible. As was held in *United States v. Mandujano,* 425 U.S. 564, 576-77, 96 S.Ct. 1768, 1776-77 (1976).

> "Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected; unless immunity is conferred, however, testimony may be suppressed, along with its fruits, if it is compelled over an appropriate claim of privilege. *United States v. Blue,* 384 U.S. 251, 255, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510, 514 (1966). On the other hand, when granted immunity, a witness once again owes the obligation imposed upon all citizens — the duty to give testimony — since immunity substitutes for the privilege.
>
> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative."

In that case the Supreme Court relied on its prior decision in *Bryson v. United States,* 396 U.S. 64, 90 S.Ct. 355 (1969), wherein that court said (396 U.S. at 72):

> "[I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions — lying is not one of them."

In other words, if petitioner believed that the immunity given to him by the prosecutor was insufficient, he should have either refused to answer the questions put to him on that ground and/or sought clarification with respect to the scope of the immunity of the court supervising the grand jury.

If petitioner had taken either of such steps the supervising court might well have advised him, as the Court of Appeals for the First Circuit held in *In re Bianchi,* 542 F.2d 98, 101 (1st Cir. 1976), that:

> "The requirement that every sovereign state or federal, recognize immunity granted by another sovereign, *Murphy v. Waterfront Commission,* 378 U.S. 52, 79, 84 S.C. 1594, 12 L.Ed.2d 678 (1964), protects appellant from the use of his grand jury testimony in any state prosecution."

and/or required the prosecutor to obtain an agreement of use immunity from the appropriate authorities in New Jersey.

While in this Court's opinion the latter would have been preferable in light of the arguably more limited holding by the Supreme Court in *Murphy v. Waterfront Commission,* 378 U.S. 64 (1964), the existence of such latter alternative is sufficient to defeat petitioner's claim herein.

Petitioner's second ground is that he was illegally denied his right to leave the grand jury room to consult with his attorney. The record shows, however, that petitioner did not make his request to see his lawyer until he already had uttered 54 of the 55 statements which the three count indictment brought against him assigned as perjurious. And the reason that petitioner did request to see his lawyer made shortly before the 55th perjurious statement, appears to have been that the grand jury session had lasted too long and the hour was getting late. He did not object

to any of the *questions* asked of him. Moments afterward he agreed with the prosecutor to continue testifying until 4 p.m. Furthermore, the 55th perjurious statement which petitioner made after requesting to see his attorney, appears to have been cumulative of other statements assigned as perjurious in the second count of the indictment.

Finally, petitioner argues that the prosecutor improperly tricked him into committing perjury in violation of his rights to due process. As the Court of Appeals held, there is no question but that the grand jury was conducting a valid investigation and that petitioner's testimony was relevant to that investigation. The prosecutor warned petitioner at the outset that he had evidence which indicated petitioner's involvement in kickback deals with nursing home customers and that he could be prosecuted for perjury if he lied. Moreover, the prosecutor framed his questions with the very same words which petitioner and Feinberg had used during their conversation which had been taped during the course of the investigation. Thus there is no substance to petitioner's claim on this ground.

For the foregoing reasons petitioner's application for a writ of habeas corpus must be, and the same hereby is, denied.

SO ORDERED.

s/ Thomas C. Platt
U.S.D.J.

APPENDIX C — OPINION OF THE NEW YORK COURT OF APPEALS

STATE OF NEW YORK

COURT OF APPEALS

2 No. 576

The People etc.,

Appellant,

v.

Joshua Pomerantz,

Respondent.

(576) Charles J. Hynes, Deputy Attorney General (Richard D. Carruthers, T. James Bryn, Arthur Weinstein & Philip Stern of counsel) for appellant.

Julia Pamela Heit, NY City, for respondent.

BREITEL, Ch. J.:

This is another appeal testing the validity of a perjury prosecution for testimony given before a grand jury (see *People v. Tyler,* ——NY2d——, decided herewith; see, also, *People v. Schenkman,* ——NY2d——, decided herewith). Defendant, a supplier of paper goods and household chemicals to nursing homes, was convicted after a jury trial on three counts of perjury in the first degree (Penal Law, §210.15). He was sentenced to indeterminate concurrent terms of three years on each count. The Special Prosecutor for Nursing Homes appeals from the Appellate Division's unanimous reversal and dismissal of the indictment.

Appendix C

Involved is defendant's false testimony before a Kings County grand jury investigating fraud in the nursing home industry in New York. The primary issue is whether a prosecution for perjury before the grand jury is defective solely because the false testimony concerns an out-of-State meeting, arranged by the Special Prosecutor, between defendant and an out-of-State nursing home operator working as an undercover agent. Also at issue is whether the prosecutor's questioning about the meeting, at which a scheme to defraud the Medicaid program was discussed, was aimed solely or substantially at trapping defendant into giving false testimony.

The order of the Appellate Division should be reversed. The meeting was material to the authorized substantive investigation of the grand jury, namely, exposure of corruption in the New York nursing home industry. Resort to an undercover agent to elicit defendant's knowledge is a legitimate investigatory technique. The meeting which took place in New Jersey disclosed defendant's familiarity with fraudulent New York practices. Moreover, the prosecutor's questioning was not a trap to support a prosecution for perjury. The subject matter of the meeting should have made it memorable, and the prosecutor's repetition and restatement provided ample cues to stimulate defendant's recollection (see *People v. Schenkman,* ——NY2d——, *supra,* decided herewith). If indeed a trap was set, it was aimed not at perjury, but at flushing out the truth. (Compare *People v. Tyler,* ——NY2d——, *supra,* decided herewith.)

In connection with the investigation of nursing home operators and their suppliers, the Special Prosecutor discovered widespread scandalous abuse of the Medicaid reimbursement program. One common scheme was for suppliers to provide customers with inflated or fictitious bills to cover "kickbacks". Although full Medicaid reimbursement would be claimed and received by the home, the overpayment made by the home to the supplier would eventually be shared by the perpetrators.

Appendix C

To further the investigation the prosecutor enlisted one Ira Feinberg, then recently convicted in federal court on charges of securities fraud and conspiracy. It was agreed that Feinberg, an owner of nursing homes, would invite several supply companies to the newer of his two New Jersey facilities. The true purpose of the meetings was to discover involvement by suppliers in illegal kickback schemes in New York State.

The Pomerantz Paper Corp. of Brooklyn, of which defendant is president, has been supplying nursing homes with paper goods and household chemicals since 1971. Defendant's company does business with more than 30 homes, the majority located in the New York City metropolitan area. It also has about eight customers in New Jersey. At the invitation of Feinberg, defendant visited Feinberg's Manor Nursing Home in Emerson, New Jersey, on July 15, 1975.

Following a discussion of the products needed, defendant was asked about "special deals". Although he first skirted the subject, defendant ultimately described an "arrangement" whereby a "certain percentage [is] put onto the bill". He also explained the more risky use of fictitious invoices. Offering to "work something out" with Feinberg, defendant conceded that he would favor Feinberg with benefits he was conferring on others. The conversation was surreptitiously recorded.

On March 1, 1976, a special grand jury was empaneled in Kings County to investigate nursing home corruption. Of particular interest was the extent to which suppliers were giving kickbacks. Defendant was called to testify on May 21, 1976, ten months after his meeting with Feinberg. On his own request, he was granted immunity.

After some inquiry into defendant's personal background and the operation of his company, the prosecutor had defendant list the nursing homes he serviced and the particular persons

Appendix C

with whom he dealt. Questions about other homes and persons connected with them followed. With respect to Feinberg defendant was asked:

> Q. Have you ever done any business of or solicited any business from the Manor Nursing Home in Emerson New Jersey?
>
> A. I don't remember.
>
> Q. That is run by a Mr. Ira Feinberg?
>
> A. I don't recall.
>
> Q. Have you ever met Mr. Feinberg?
>
> A. I don't remember.
>
> Q. Mr. Feinberg also runs the Manor Nursing Home in Tenafly New Jersey?
>
> A. I don't know where Tenafly is.
>
> Q. Well, have you ever met Mr. Feinberg?
>
> A. I don't remember.
>
> Q. Is it possible?
>
> A. Sure, it is possible.

A few other names were mentioned, but the questioning returned to Feinberg:

> Q. Once again I want to ask you whether you have ever met or solicited business from Mr.

Ira Feinberg who had or has nursing home interests in among others the Manor Nursing Home at Tenafly, New Jersey, and the Manor Nursing Home in Emerson, New Jersey?

A. I don't remember, I don't remember, the name does not strike — the name, I don't remember the name.

Q. Is it possible?

A. It is—sure, it is possible.

Q. Well, how likely is it?

A. I don't know.

Q. Do you have any recollections at all of meeting Mr. Ira Feinberg?

A. None at all. I don't know where those places are.

Defendant's familiarity with kickbacks was the object of extensive examination. Defendant denied not only participating in wrongdoing, but asserted that he had only newspaper knowledge. The following are but a few examples among many:

Q. Have you ever heard of or do you have any personal knowledge of the alleged practice in the nursing home industry of vendors inflating their bills to nursing homes?

A. Just what I read in the papers.

Q. You have no personal knowledge of that practice?

A. No, sir.

Q. You have never engaged in that practice yourself?

A. No, no sir.

Q. Have you ever heard of or do you have any personal knowledge of the alleged practice in the nursing home industry of vendors giving extra bills or invoices to nursing homes?

A. Just what I read in the paper.

Q. You have never engaged in that practice yourself?

A. No.

* * *

Q. I want to be very clear on this, to the best of your knowledge has any nursing home owner, operator, administrator, or other employee that you have solicited business from ever in words or substance requested or asked you for any special deals so that he can make a few dollars?

A. I cannot remember every person who I dealt with in business if that ever came across.

* * *

Q. Mr. Pomerantz, have you ever said, suggested, or told any nursing home owner,

operator, administrator, or other employee in words or substance that he can have 10% added onto his bills?

A. You've asked me the question four times already.

Q. Please answer. This will be the last time in that form at least.

A. I must say I don't recollect ever having offered anyone in anyway any type of kickback.

* * *

Q. Have you ever said, suggested, or acknowledged in any way to any nursing home owner, operator, administrator, or other employee that you would add on 10% to their bills and then give them back the 10% in cash?

A. I cannot recall making such a statement.

Q. If you had made such a statement you would recall it, would you not?

A. I sure would.

* * *

Q. I want you to listen to my questions very carefully because they are different. Have you ever told any nursing home owner, operator, administrator, or other employee in effect that you give other people in the nursing home industry 10% inflated bills?

A. To the best of my recollection I don't remember ever making such a statement.

Q. Have you ever said, suggested, or told any nursing home owner, operator, administrator, or other employee that when you make such deals it is on that basis, meaning on the basis of a 10% inflated bill?

A. To the best of my recollection I don't remember making such a statement.

In a last effort, the prosecutor raised Feinberg's name for the third time, and, consistent with his earlier responses, defendant said he did not recall meeting him.

At one point in the questioning defendant asked to speak to his lawyer. The prosecutor indicated he had only one further question. Although more than twenty questions followed, defendant did not repeat the request. Finally, before concluding, the prosecutor warned defendant he could be indicted for perjury, but defendant declined the invitation to change his testimony.

A three-count indictment for perjury in the first degree resulted. Count one charges defendant with falsely denying knowledge of kickbacks; the thrust of count two is that defendant falsely stated he never discussed kickbacks with operators; and count three relates to defendant's statements that he had never offered to arrange a kickback scheme.

At trial the principal witness for the People was Feinberg. Defendant explained his grand jury testimony about Feinberg as a lapse in memory. According to defendant, with the exception of Feinberg, he had never offered kickbacks to an operator. He only "play[ed] along" with Feinberg so as not to "turn him off".

Neither defendant nor the Appellate Division question the Special Prosecutor's authority to investigate defendant as a supplier of nursing homes in New York. As in *People v. Tyler* (——NY2d——, *supra*), also decided today and involving a conviction for perjury before the grand jury, it is the methods employed by the prosecutor that are challenged. Dismissal of the indictment was required in *Tyler* because defendant's false answers were in response to questions designed substantially to extract perjury, manifesting no palpable interest in evoking facts material to the authorized underlying inquiry. In this case, however, the objections do not withstand analysis.

There is no basis for arguing that the prosecutor improperly enlisted the aid of a convicted felon to determine whether defendant had valuable knowledge. The use of an undercover agent to expose corruption is an acceptable and traditional investigatory technique (see, e.g., *Lewis v. United States,* 385 US 206, 210, reh den 386 US 939; cf. Model Penal Code §2.10, Comment 2 [Tent. Draft No. 9, 1959]). Nor is there basis for criticizing the situs of the meeting. Obviously, neither the Special Prosecutor nor the grand jury would purport to act on corruption beyond the borders of New York. It does not follow, however, that conversation in New Jersey with New York content is irrelevant to investigation of crime in New York.

Defendant's conversation with Feinberg, albeit in New Jersey, revealed much about practices in New York. In addition to detailing how bills would be inflated by 10 percent to defraud authorities, defendant described the use of fictitious receipts for an even higher illegal return. Also potentially useful to the authorities was defendant's explanation of how a profit of more than 10 percent could be made on chemicals, since chemicals were a "blind spot" with the regulatory authorities.

At no point did defendant suggest that the practices he was describing were limited to New Jersey. In fact, the majority of

homes serviced by defendant are in New York. It is true that the New Jersey meeting did not produce a list of suspected New York operators. That, however, was precisely why defendant was called before the grand jury. Defendant was by no means the sole or any target of the investigation; indeed, he was granted immunity for his testimony. It was information about those accepting illegal kickbacks that the prosecutor wished and hoped to obtain from defendant. Put another way, the prosecutor, in calling defendant before the grand jury based on the information uncovered by Feinberg, had a legitimate law enforcement objective material to an authorized substantive investigation in New York (compare *People v. Tyler,* ——NY2d——, *supra,* decided herewith).

The contention that the prosecutor's questioning was aimed substantially at trapping defendant into giving false testimony is baseless. In sharp contrast to the interrogator in the *Tyler* case, the prosecutor questioning defendant did not limit his inquiry to peripheral details of a transaction not demonstrated to be significant or otherwise memorable. The recording made by Feinberg proves that a corrupt arrangement was in fact discussed at the New Jersey meeting. The encounter was thus a significant one, and would be memorable 10 months later, even if, incredibly, it was defendant's first conversation about nursing home corruption. If it were not, then defendant's other denials were patently false. There is no escape from his dilemma.

Even had defendant, improbably, forgotten his meeting with Feinberg, the prosecutor provided ample cues to stimulate defendant's recollection. Unlike the interrogator in the *Tyler* case (*supra*), who evinced no interest in having defendant give a convincing narrative of the meeting about which he was questioned, the prosecutor questioning defendant raised Feinberg's name three times, provided the name of the nursing home Feinberg was about to open, and asked defendant whether he had ever met Feinberg in Emerson, New Jersey. That the

precise date of the meeting was not given to defendant, or the transcript of the recording read, is immaterial. It is unreasonable to suggest that defendant's recollection would have improved had the exact meeting date been given to him. Nor should the prosecutor be required to confront defendant with the recording, lest he conform his testimony to what was already known and fail to add to the prosecutor's knowledge. In fact, on the trial, as the prosecutor argues, defendant, when then confronted with the recording, tailored his testimony to attempt vainly to overcome the damning proof against him.

On the general topic of illegal kickbacks, the prosecutor, as the quoted excerpts indicate, unrelentingly pressed defendant. Much like the prosecutor in *People v. Schenkman* (*supra*), decided herewith, the key questions were repeated, restated, and elaborated upon until it was apparent that further effort was fruitless. With respect to the 10 percent figure, for example, even defendant complained: "you've asked me the question four times already." More than 80 questions, consuming over 20 pages of testimony, were put to defendant. The determination to extract whatever pertinent information defendant possessed could not be more evident.

It is true that in summation the prosecutor admitted wanting "to trap Joshua Pomerantz" and "get knowledge about what he did." Critical in distinguishing this case from the *Tyler* (*supra*) case, however, is that it is not into giving false testimony that the questioner sought to trap defendant. Here the "trap", as the prosecutor truly said, was aimed at ferreting out the facts. In short, the interest in furthering the investigation is manifest, and the technique employed unobjectionable.

One more matter should be addressed. The three counts of perjury involved 55 false statements, 54 of which had been given by the time defendant asked to talk with his lawyer. The one false statement made by defendant that followed his request is merely the last of 32 assignments of perjury charged in count

two. Failure to honor the request was therefore a triviality. The Appellate Division's suggestion, moreover, that confusion about the scope of his immunity prompted defendant to request to see his lawyer, is unsupported in the record.

This case, in sum, presents the counterpoint to *People v. Tyler* (——NY2d——, *supra,* decided herewith). Both the meeting in New Jersey and the questions put to defendant before the grand jury were aimed at uncovering, through defendant, corruption in the New York nursing home industry. That a perjury conviction eventuated cannot be assigned to the prosecutor; that was defendant's own doing. The examiner met his burden of demonstrating that the interrogation before the grand jury had a legitimate substantive investigatory purpose. For all the reasons indicated, there was no abuse of the grand jury process and oath by the prosecutor.

Before concluding, it is essential to add a caveat. An investigatory examination which may seem to parallel what is approved in this case would not stand if on the record it were demonstrable that what was ultimately involved was a sophisticated facade to trap the defendant into a new crime of perjury or contempt, and not to establish evidence of antecedent crime. The court is concerned with substance, not form.

Accordingly, the order of the Appellate Division should be reversed and the matter remitted to the Appellate Division for review of the facts.

* * * * * * * * * *

Order reversed and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Breitel, Ch.J. All concur.

Decided December 20, 1978

APPENDIX D — OPINION OF THE APPELLATE DIVISION, SECOND DEPARTMENT OF THE STATE OF NEW YORK

SUPREME COURT : APPELLATE DIVISION

SECOND JUDICIAL DEPARTMENT

LATHAM, J.P., DAMIANI, MARGETT and HAWKINS, JJ.

THE PEOPLE, etc.,

Respondent,

-against-

JOSHUA POMERANTZ,

Appellant.

APPEAL from a judgment of the Supreme Court, Kings County (SYBIL HART KOOPER, J.), rendered October 19, 1977, convicting defendant of perjury in the first degree (three counts), upon a jury verdict, and imposing sentence.

Julia Pamela Heit, New York, N.Y. (Rhodes & Fisher [Steven W. Fisher] of counsel), for appellant.

Charles J. Hynes, Deputy Attorney-General, New York, N.Y. (Richard D. Carruthers and Arthur Weinstein of counsel), for respondent.

H A W K I N S, J. The defendant appeals from a judgment of the Supreme Court, Kings County, rendered October 19, 1977, convicting him of three counts of perjury in the first degree and imposing sentence. The judgment should be reversed, on the law, and the indictment dismissed.

Appendix D

The defendant operates the Pomerantz Paper Company, a wholesale distributor of paper goods and household chemicals in Brooklyn, New York. He does most of his business with nursing homes and health related facilities in the metropolitan area. The defendant has been convicted of perjury in that he lied to a Kings County Grand Jury which was investigating fraud in the nursing home industry in New York.

The events leading up to the defendant's perjury conviction commenced in 1975. One Ira Feinberg had been convicted in Federal court on charges of securities fraud and conspiracy. The Federal prosecutor in that case was subsequently appointed as a prosecutor in the office of the Deputy Attorney-General (Special Prosecutor) investigating nursing home fraud. It was agreed that if Feinberg co-operated with New York State's investigation into nursing home fraud, the Federal authorities would recommend that the Federal court reduce his interim sentence to 18 months.

Early in 1975, at the instruction of the office of the Special Prosecutor, Feinberg telephoned the defendant and asked him to come to his nursing home in Emerson, New Jersey, to discuss the purchase of supplies for the home. The meeting was set for July 15, 1975. Before the defendant arrived in New Jersey that day, Feinberg conferred with the New York authorities and a recording device was concealed on his person. The device was activated when the defendant arrived at the nursing home and it recorded their entire conversation.

After discussing the kinds of products that he would need, Feinberg began to question the defendant as to whether he could get a "special deal". The defendant initially avoided the topic, but Feinberg returned to the question several times, indicating that he should be able to "make a few dollars" since he was not only the administrator of the home, but its owner as well. Finally, the defendant suggested that he could add 10% to the bills which he submitted to the nursing home and give it back to Feinberg in cash. The conversation then ended.

Appendix D

In 1976 a Kings County Grand Jury was investigating corruption in New York's nursing home industry. The inquiry focused on the extent to which suppliers of goods and services were giving kickbacks to nursing home operators or employees. On May 21, 1976, 10 months after his meeting with Feinberg, the defendant was called to testify before the Grand Jury. Before testifying, the defendant asked for and was granted immunity.

In the course of his testimony, the defendant denied knowledge of any special deals by which nursing home bills were inflated by 10% with the money being funneled back to the nursing home administrator. The defendant stated that he had never even discussed inflated bills or extra invoices with any nursing home administrators. The defendant further stated that he could not recall ever having engaged in a kickback arrangement and admitted that if he had done so, he would have remembered it. The defendant testified that he did not remember soliciting business from anyone named Ira Feinberg, either at the Manor Nursing Home in Emerson, New Jersey, or at the Manor Nursing Home in Tenafly, New Jersey, both of which are owned by Feinberg. However, the defendant did state that he did not remember everyone from whom he had solicited business and that it was possible that he had met Ira Feinberg. The defendant went on to state that he did not remember suggesting to Feinberg or any New Jersey nursing home operator that he could provide bills inflated by 10%. Finally, the defendant stated that he didn't recall telling Mr. Feinberg that he would deliver kickback money in person.

At one point during the questioning the defendant asked to speak to his attorney. However, the Special Prosecutor indicated that he had only one further question. More than twenty questions were thereafter asked before the testimony was completed.

The defendant was then indicted on three counts of perjury. Count one charged that the defendant lied when he denied

Appendix D

knowledge of nursing home kickbacks. Count two charged that the defendant lied when he denied that he had ever discussed kickbacks with nursing home administrators. Count three charged that defendant lied when he denied that he had ever offered kickbacks to nursing home administrators. At the trial, the primary witness for the People was Ira Feinberg, who testified to his meeting with the defendant in New Jersey. While the prosecution presented two other witnesses against the defendant, their testimony was not conclusive. Thus, the only significant proof at the trial that the defendant knew about kickbacks, had discussed kickbacks and had offered kickbacks to nursing home personnel, centered around his meeting with Feinberg. The defendant was found guilty on all counts and was sentenced to serve concurrent terms of from zero to three years imprisonment on each count. The judgment of conviction should be reversed and the indictment dismissed.

The basic difficulty with the defendant's perjury convictions stems from the fact that he was questioned before a New York Grand Jury about a transaction which occurred in New Jersey and which had no relevance to New York. Indeed, the fact that the perjury charges were based upon an out-of-state transaction was no accident; it was the Special Prosecutor who directed Feinberg to summon the defendant to New Jersey and instigate the kickback discussion. As will become evident, this contrived meeting, and the subsequent questioning of the defendant about it, served no legitimate law enforcement objective and was designed solely to obtain a perjury indictment. To that extent, this excess of prosecutorial zeal violated certain principles of fairness recently enunciated by this court and by the Court of Appeals. (See *People v. Tyler,* 62 AD2d 136; *People v. Isaacson,* ——NY2d——[May 9, 1978].)

In *People v. Tyler,* (*supra*), the defendant, a Justice of the Supreme Court, was accused of lying before a Grand Jury which was investigating his relationship to one Raymond Marquez. It

appeared that the New York City Police Department had had Tyler under surveillance for a lengthy period of time. On May 16, 1975 the police followed him to a particular restaurant where he met Marquez for a period of shortly more than an hour.

Subsequently, Tyler was called before the Grand Jury and asked about his meeting with Marquez. In response to certain questions, Tyler gave answers that were not accurate. However, his answers were somewhat equivocal and the prosecutor failed to probe Tyler's story during his direct examination, despite the fact that the prosecutor had massive amounts of detail about the meeting with Marquez. Relying on this as one ground for reversal, this court commented (62 AD2d at p 143):

> "The failure of the prosecutor to follow this time-tested stratagem of basic cross-examination procedures suggests, at least, that the prime purpose of the prosecutor who presented the case to the Grand Jury (and who is no longer in office) was not so much to pursue a legitimate line of inquiry but to indict the appellant for perjury. In *Brown v. United States,* (245 F2d 549, 555), the court put it this way: 'The court is of the opinion that the evidence in this case clearly established that *** [the prosecutor's] purpose was simply to do what he did, viz., to extract from defendant his testimony about the talk in which he had taken part in St. Louis on May 3, 1950, knowing that his recollection of it differed from that of the others present, and to get him indicted for perjury. He knew how each of the parties to that talk, including defendant, remembered it because each had made his sworn statement to investigator Strain, and three of the parties to the talk had already given their recollection of it to the grand jury before Newcomb called defendant. Extracting the

> testimony from defendant had no tendency to support any possible action of the grand jury within its competency. The purpose to get him indicted for perjury and nothing else is manifest beyond all reasonable doubt.' "

In *People v. Isaacson* (*supra*), the Court of Appeals reversed defendant's conviction for criminal sale of a controlled substance in the first degree. The police initially captured an individual and seized a certain substance from him which they thought was cocaine. Upon examination, however, the police discovered that the substance seized was not a controlled substance. The police concealed this fact from the individual and then persuaded him to co-operate with them by acting as an informer. The informer then pressured defendant, Isaacson, into selling him cocaine by stating that he needed money in order to hire an attorney for his own defense. Finally, defendant agreed to sell cocaine, but insisted that the sale occur in Pennsylvania. The informer then tricked defendant into entering New York State by arranging for the sale to take place at a bar just inside an *unmarked boundary.*

In reversing the conviction, the Court of Appeals relied on the due process clause of the State Constitution, rather than the statutory defense of entrapment (Penal Law, § 40.05). (Since defendant had made prior drug sales and had a propensity to commit the crime charged, entrapment could not be established.) Three factors were cited as requiring a dismissal of the indictment: (1) defendant's prior drug sales were minor and thus his propensity to participate in this particular transaction was minimal; (2) defendant was persuaded to make the New York sale only by the deceitful enticement of the informer; and (3) in the light of the first two factors, it was obvious that the police were not interested in crime prevention or any other legitimate law enforcement objective, but only in obtaining a drug conviction of *anyone they could catch.*

In both *Tyler* and *Isaacson,* the courts have indicated an increasing distaste for overzealous prosecutorial conduct which encourages violations of the law and which betrays an unbounded thirst for criminal convictions. Unless the desire for prosecution is grounded in some legitimate law enforcement objective, it may precipitate conduct which exceeds the bounds of fair play. In the instant case, the prosecutor sought a perjury indictment against the defendant solely because he would not co-operate in the nursing home investigation. As will be shown later, it was this desire which caused the Special Prosecutor to discourage the defendant from seeking badly needed aid of counsel during his Grand Jury testimony.

A review of the record indicates that the Grand Jury interrogation of the defendant served no legitimate law enforcement objective; the only conceivable purpose for the transaction and subsequent interrogation was to set the stage for a perjury prosecution. Certainly, there was no significant prosecutorial purpose to be served by arranging the meeting with Feinberg. There could be no hope of convicting the defendant for the underlying nursing home fraud since it is elementary that New York has no jurisdiction to prosecute a person for crimes committed in New Jersey. Nor was there any investigative purpose in questioning the defendant before the Grand Jury about his meeting with Feinberg. The Special Prosecutor had tape recorded the conversation between the defendant and Feinberg and knew more about the incident than the defendant. Since the two men never discussed New York nursing homes, their discussion was not relevant to nursing home fraud in this State.

The Special Prosecutor claims that he had a legitimate purpose for setting up the Feinberg meeting, namely, to provide an independent means of measuring the defendant's credibility before the Grand Jury. However, the defendant's Grand Jury appearance occurred more than 10 months after his meeting with Feinberg, and it does not appear that the defendant had

any subsequent meetings with Feinberg in which kickbacks were made or even discussed. Considering the lapse of time and the fact that the defendant routinely solicited business from many nursing home owners, the Special Prosecutor's test of credibility is of doubtful validity.

Even assuming that the Feinberg meeting offered a valid test of the defendant's credibility, the assessment of his veracity certainly did not require that he be prosecuted for perjury. This is especially true since the questions *which were the subject* of the prosecution were not relevant to the Grand Jury investigation. While the statute defining perjury in the third degree (Penal Law, §210.05) does not make materiality an element of the crime, the prosecutor must have some good faith purpose behind his questions, beyond a mere perjury prosecution (cf. *People v. Tyler,* 62 AD2d 136, *supra*). As a minimum, there must exist the *possibility* that the questions posed may elicit helpful information.

This departure from matters relevant to the Grand Jury worked a substantial prejudice to the defendant's Fifth Amendment privilege against self-incrimination. Prior to testifying before the Grand Jury, the defendant asked for, and was granted, immunity pursuant to CPL 190.40. Consequently, the defendant could not be convicted in New York State courts for any matter about which he testified before the Grand Jury, unless the conviction was for perjury or contempt (see CPL 50.10, subd 1). The question in this case is to what extent the defendant's privilege against self-incrimination would be respected in another jurisdiction, namely, New Jersey.

Prior to the decision in *Murphy v. Waterfront Comm.* (378 US 52), witnesses were confronted with the dilemma of prosecution in one jurisdiction based upon statements made to another sovereign under a grant of immunity (see, e.g., *Feldman v. United States,* 322 US 487; *United States v. Murdock,* 284 US 141). Thus, a witness could be compelled to testify before a state

grand jury although Federal authorities might later use that testimony to prosecute him under Federal law (*Knapp v. Schweitzer,* 357 US 371). This result occurred because the Supreme Court of the United States had held that the Fifth Amendment only imposed restrictions on Federal authorities and did not apply to the states.

However, in *Murphy v. Waterfront Comm.,* (*supra*), the Supreme Court held that the Fourteenth Amendment made the Fifth Amendment privilege against self-incrimination fully applicable to the states. Accordingly, the court concluded that when a witness testifies before a state tribunal under a grant of immunity, he receives a "use" immunity in the Federal courts; Federal authorities may make no use whatever of any incriminating information that a witness might divulge in the course of his testimony.

The question of whether one state's grant of immunity will be respected in another state is less certain. At this moment there is no United States Supreme Court decision directly on the point which would bind the several states. Judicial authority on the matter is sparse (see *People v. Lev,* 91 Misc 2d 241). In *People v. Lev,* (*supra*), on facts nearly identical to those before us, the Supreme Court, Bronx County, took the position that the rationale of *Murphy v. Waterfront Comm.,* (*supra*), applies to all jurisdictions in the Federal structure, and held that a witness in New York, asked about his conduct in New Jersey, would have use immunity in that state. This view also has the support of at least one highly regarded authority (Richardson, Evidence [Prince, 10th ed.], § 529, p. 524). Applying this rationale, the defendant could not have refused to answer the questions about his meeting with Feinberg on a claim of self-incrimination, since he would have had immunity in New Jersey.

Nevertheless, the defendant's convictions must be reversed and the indictment dismissed because he was not given a fair opportunity during the Grand Jury proceeding to ascertain the

scope of his immunity. As is obvious by now, the extent of the defendant's immunity is not a matter free from doubt. Moreover, the Special Prosecutor was fully aware that the question of the extra-state effect of New York's immunity would arise, because the defendant had been "set up" in New Jersey, with a view towards questioning him in New York. Despite this knowledge, the Special Prosecutor failed to inform the defendant that his immunity would apply to conduct which occurred outside this State. The defendant was obviously confused on this point; during his Grand Jury testimony, he asked to speak with his attorney immediately after answering a question about Ira Feinberg. Instead of granting the request, the prosecutor discouraged the defendant from seeking legal counsel by stating that there would be only one additional question. This further suggests that the prosecutor was only interested in obtaining a perjury indictment once he had determined that the defendant was lying.

In the light of the foreknowledge of the Special Prosecutor that a complex question of privilege would arise as to which no definitive answer existed, it would have been preferable for him to have explained to the defendant the scope of his immunity. However, as a minimum, the defendant should have been permitted to speak to his attorney immediately upon his request. (See *People v. Ianniello,* 21 NY2d 418.) In the circumstances of this case, the failure to do so requires a reversal (cf. *People v. Tyler,* 62 AD2d 136, *supra*).

LATHAM, J.P., DAMIANI and MARGETT, JJ., concur in the opinion of Mr. Justice HAWKINS.

FILED
MAR 14 1980
MAR 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1319

JOSHUA POMERANTZ,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES J. HYNES
Deputy Attorney General
State of New York
Attorney for Respondent
270 Broadway
New York, New York 10007
(212) 488-5767

RICHARD D. CARRUTHERS
Special Assistant Attorney General
Of Counsel

TABLE OF CONTENTS

	PAGE
Jurisdictional Statement	1
Questions Presented	1
Statement of the Case	2
Argument—None of the petitioner's claims merits review by this Court	8
A. The Petitioner's Fifth Amendment Claim	8
B. The Petitioner's Sixth Amendment Claim	10
C. The Petitioner's "Perjury Trap" Claim	12
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Bianchi, In re, 542 F.2d 98 (1st Cir. 1976)	10
Blair v. United States, 250 U.S. 273 (1919)	12
Bronston v. United States, 409 U.S. 352 (1973)	13
Bryson v. United States, 396 U.S. 64 (1969)	9, 11
Masinia v. United States, 296 F.2d 871 (8th Cir. 1961)	12
Murphy v. Waterfront Commission, 378 U.S. 52 (1964)	9, 10
People v. Pomerantz, 63 A.D.2d 457, 407 N.Y.S.2d 723 (2nd Dept. 1978)	6
People v. Pomerantz, 46 N.Y.2d 240, 413 N.Y.S.2d 288, 385 N.E.2d 1218 (1978)	6
Pomerantz v. New York, 471 F.Supp. 338 (E.D.N.Y. 1979)	7

PAGE

Sigety v. Hynes, Matter of, 38 N.Y.2d 260, 379 N.Y.S. 2d 724, 342 N.E.2d 518, *cert. denied sub nom.* Kent Nursing Home v. Office of the Special Prosecutor, 425 U.S. 974 (1976) 2

United States v. Apfelbaum, No. 78-972, —— U.S.—— (March 3, 1980) 9, 11
United States v. Camporale, 515 F.2d 184 (2nd Cir. 1975) 13
United States v. Del Torro, 513 F.2d 656 (2nd Cir.), *cert. denied,* 423 U.S. 826 (1975) 13
United States v. Mandujano, 425 U.S. 564 (1976) 9, 11
United States v. Winter, 348 F.2d 204 (2nd Cir.), *cert. denied,* 382 U.S. 955 (1965) 13

Zicarelli v. New Jersey Commission, 406 U.S. 472 (1972) 10

Statutes:

28 U.S.C. §1254(1) 1

28 U.S.C. §2253 8

McKinney's Consolidated Laws of New York

Criminal Procedure Law §190.40 3

Penal Law §210.15 5

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1319

JOSHUA POMERANTZ,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Jurisdictional Statement

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the petitioner was entitled to lie under oath to a New York grand jury about a conversation that he had in New Jersey on the ground that he had a concern, which he failed to express until his appeal from his conviction for perjury, that truthful testimony could be used as a basis for prosecution in New Jersey.

2. Whether the petitioner's perjury conviction should be nullified because, after uttering to the grand jury 54 of a total of 55 perjurious statements, the petitioner requested to see his attorney without giving any reason for the request, and then abandoned the request by consenting to a brief continuation of his testimony.

3. Whether the petitioner's right to due process was violated during the grand jury session at which he committed perjury by a prosecutor who warned him that he had evidence concerning petitioner's involvement in the criminal conduct under investigation and who then endeavored to get the truth from him with probing questions.

Statement of the Case

In January 1975, the State of New York authorized its Attorney General to conduct an intensive civil and criminal investigation into rampant corruption within the State's nursing home industry. *Sigety* v. *Hynes,* 38 N.Y.2d 260 (1975), *cert. denied sub nom. Kent Nursing Home* v. *Office of Special Prosecutor,* 425 U.S. 974 (1976). The investigation revealed that many supply firms were providing their nursing home customers with inflated or fictitious bills which the homes paid in full. Although the suppliers secretly returned to the operators of the nursing homes the full amount of these payments, the nursing homes involved were claiming and receiving Medicaid reimbursement from the State of New York based upon the full amount of the inflated or fictitious expenses.

Petitioner is a supplier of paper goods and cleaning chemicals to more than 30 nursing homes. His firm, the

Pomerantz Paper Company, is located in Brooklyn, New York. Twenty-two of his nursing home customers are located in New York State; eight are located in New Jersey. In July 1975, petitioner spoke to Ira Feinberg, the operator of a nursing home in New Jersey, concerning the kickbacks which petitioner pays to some of the institutions which he supplies. Petitioner described, in some detail, the typical methods by which he channeled kickback money to his nursing home clients. He also offered to pay kickbacks to Feinberg. This conversation took place at Feinberg's nursing home in New Jersey. Feinberg, in cooperation with the office of New York State's Special Prosecutor for Nursing Homes, wore a device which recorded petitioner's statements.

In May 1976, petitioner was called before a grand jury sitting in Brooklyn, New York, which was investigating frauds committed against New York's Medicaid reimbursement system by nursing home operators with the help of firms which supply nursing homes with goods and services. Petitioner was granted transactional immunity automatically by operation of New York State law for all matters about which he testified during his grand jury appearance. New York Criminal Procedure Law (CPL) §190.40 (McKinney 1971). (At the beginning of his testimony petitioner asked the prosecutor to grant him immunity. However, in view of CPL §190.40, this request was not necessary.) The prosecutor advised petitioner about this grant of immunity. He also described for petitioner the matters which the grand jury was investigating, and warned petitioner that he had evidence which indicated that petitioner might be giving kickbacks to his nursing home customers. The prosecutor repeatedly warned peti-

tioner, too, that he could be prosecuted for perjury if he lied in his testimony before the grand jury.

At the prosecutor's request, petitioner identified all of his nursing home customers in both New York and New Jersey. The prosecutor then asked him whether he had offered kickbacks to any nursing home operator. Petitioner denied that he had. Petitioner also denied having any personal knowledge about the use of kickbacks in the nursing home industry. He repeatedly denied that he had even spoken to any nursing home operator, including Ira Feinberg, about kickbacks.

Petitioner did not object to any question which the prosecutor asked him before the grand jury. Nor did he refuse to answer any question. In fact, the only complaints that petitioner made with respect to the grand jury proceeding were repeated references to the lateness of the hour. (The session ended at about 4 P.M.) Within minutes of his last such reference, petitioner asked to see his attorney:

> Q. Have you ever directly or indirectly sent or delivered or caused to be sent or delivered an inflated bill or delivery ticket to Fred Silverberg at the Hyde Park Nursing Home?
>
> A. No. Can I speak with my attorney please?
>
> Q. One last question, have you ever had any conversations whatsoever with Jack Rosen, Joseph Cohen, Andy Glattstein, Ira Feinberg, or Edward Karten in which you offered to give any of these individuals an inflated bill or cash rebate of any kind?
>
> A. I don't recall any such conversation.

The latter answer was the 55th and last statement alleged and found to be perjurious.

Although the prosecutor continued the questioning after petitioner had asked to see his attorney, petitioner neither complained nor repeated his request to see his attorney. Rather, he told the prosecutor that it was acceptable to him to continue the inquiry so long as it ended by 4 P.M. Shortly after petitioner asked to see his attorney, he left the grand jury room at the prosecutor's request and went into an anteroom where his attorney was waiting. When he was called back before the grand jury to complete his testimony, he did not object to any aspect of the grand jury proceedings. Instead, he answered eight additional questions concerning general business practices. None of his answers to these questions was assigned as perjurious in the indictment.

The petitioner lied a total of 55 times during his grand jury testimony. The prosecutor offered the petitioner an opportunity to recant. However, the petitioner declined to do so. An indictment, in which these false statements were segregated into three counts, was returned against the petitioner shortly after his grand jury testimony. Each of the three counts charged the crime of perjury in the first degree. New York Penal Law §210.15 (McKinney 1975). Petitioner was accused in this indictment of having testified falsely when he stated under oath before the grand jury (1) that he had no personal knowledge about the use of kickbacks in the nursing home industry (count one), (2) that he could not recall ever having spoken to Ira Feinberg or to any other nursing home operator about kickbacks (count two), and (3) that he had never offered a kickback to any nursing home operator, including Feinberg (count three).

The petitioner was tried before a jury which found him guilty on all three counts. He was sentenced to a maximum

three year term of imprisonment on October 19, 1977. Petitioner appealed his conviction to the Appellate Division of New York State Supreme Court, Second Department. That court reversed the conviction and dismissed the indictment, holding that the questioning of petitioner about his conversation with Feinberg was not relevant to the grand jury's investigation in New York because the conversation took place in New Jersey. Based upon this finding, the court stated that it believed the prosecutor had questioned petitioner about the conversation solely for the purpose of "trapping" him into a perjury charge. The Appellate Division further held that the prosecutor had acted improperly by failing to honor the petitioner's request to leave the grand jury room and speak to his attorney. The court surmised that the petitioner wanted to speak to his lawyer about whether the immunity he received in New York would protect him from prosecution in New Jersey. *People* v. *Pomerantz,* 63 A.D.2d 457 (2nd Dep't 1978).*

The New York Court of Appeals unanimously reversed the Appellate Division's decision and reinstated the indictment. The Court of Appeals held that the petitioner's conversation with Feinberg was "material to an authorized substantive investigation of the Grand Jury, namely, exposure of corruption in the New York nursing home industry." *People* v. *Pomerantz,* 46 N.Y.2d 240, 243 (1978). The court found that the prosecutor had treated the petitioner in a fair manner throughout the investigation. *Id.,* at 248.

* Petitioner did not contend at the trial level that either the grand jury or the prosecutor had deprived him of his right to confer with his attorney about either the scope of his immunity or any other legal matter. Nor did he argue that the prosecutor had called him before the grand jury in order to trap him into perjury. In fact, one of his trial lawyers specifically told the trial court that petitioner was not claiming that the grand jury was a "perjury trap."

It also stated that the prosecutor did not unfairly deprive him of an opportunity to consult with his attorney outside the grand jury chamber. *Id.,* at 250. The court observed that the petitioner had made 54 of the 55 statements assigned as perjurious in the indictment before asking to see his attorney.

After the New York Court of Appeals reinstated the indictment, the petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He contended that the immunity he received when questioned before the New York grand jury was not sufficient to protect him from prosecution in New Jersey based upon his grand jury testimony.* He also argued that he was illegally deprived of a right to leave the grand jury room to consult with his attorney, and, further, that the prosecutor's aim in questioning him before the grand jury was to get him indicted for perjury. The court (Hon. Thomas C. Platt, J.) dismissed the petition on May 30, 1979. *Pomerantz* v. *New York,* 471 F.Supp. 338 (E.D.N.Y. 1979). The court rejected the "immunity" argument because it could not serve to excuse perjury. *Id.,* at 343. The court also held the "right to counsel" argument was meritless because the single perjurious statement made by the petitioner after he requested to see his lawyer was merely cumulative of some of the many false statements he made before the request. *Id.* The court said that the perjury trap claim was untenable because the prosecutor had warned the petitioner at the beginning of the grand jury session that he had evidence

* The State of New Jersey has not brought any charges against the petitioner in connection with his conversation with Ira Feinberg in that State or in connection with his grand jury testimony or his perjury prosecution in New York.

of his involvement in kickback deals, and then focused the petitioner's attention on this conversation with Feinberg with probing questions.

Thereafter, pursuant to 28 U.S.C. §2253, the petitioner applied for a certificate of probable cause to appeal from the District Court's order. The application was denied by the United States Court of Appeals for the Second Circuit on November 27, 1979, upon the ground that the issues which the petitioner raised in his application for a certificate of probable cause were without merit.*

ARGUMENT

None of the petitioner's claims merits review by this Court.

A. The Petitioner's Fifth Amendment Claim

The petitioner claims that had he testified truthfully before the New York grand jury, his testimony could have been used against him by New Jersey authorities in violation of his Fifth Amendment right against self-incrimination because, according to him, New York has no power to immunize a grand jury witness from prosecution in another state. Even if it were true that New York could not immunize a witness from prosecution in another state, the fact remains that the petitioner lied under oath before a grand jury. As the District Court recognized, this fact makes irrelevant his argument concerning the ability of

* The petitioner did not seek direct review by this Court of the order of the New York Court of Appeals which reinstated his indictment. The petitioner entitles his current petition as for a writ of certiorari to the Second Circuit. Consequently, were certiorari to be granted the only ruling which could be reviewed by this Court would be the denial of the certificate of probable cause.

New York to shield him from a prosecution in New Jersey. Indeed, this Court held in *United States* v. *Mandujano,* 425 U.S. 564 (1976), that, regardless of the nature of the abuse to which he feels himself subjected during his testimony, a witness may never resort to perjury as a method of self-protection. The Court explicitly stated that "[i]n this constitutional process of securing a witness' testimony, perjury simply has no place whatever." 425 U.S. at 576. The Court, at page 577, quoted with approval from its opinion in *Bryson* v. *United States,* 396 U.S. 64, 72 (1969):

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them.

See, United States v. *Apfelbaum,* No. 78-972, at 11-12, —— U.S. —— (March 3, 1980).

If during the grand jury session the petitioner truly was concerned that the testimony obtained from him under a grant of immunity in New York could have been used as a basis for a New Jersey prosecution, he should have refused to answer the questions put to him. Or, at the very least, he should have brought his objections to the attention of the grand jury or the court which supervised the grand jury. Petitioner failed to take any of these reasonable steps. Instead, he lied 55 times.

In any event, petitioner's grand jury testimony in New York could not have been used by New Jersey authorities as a basis for prosecution against him. This Court held in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), that

the testimony of a witness who gives evidence under an immunity grant in one jurisdiction may not be prosecuted by means of that evidence in another jurisdiction. The petitioner attempts to distinguish *Murphy* from his case on the ground that *Murphy* does not deal directly with "a state-to-state immunity question." The petitioner's argument is unavailing. The holding of *Murphy* involves the proper application of the Fifth Amendment's protection against self-incrimination. This protection, of course, applies uniformly to all jurisdictions in the United States, both state and federal.* Obviously, the legal and policy principles of the *Murphy* decision are applicable when two states are involved. Indeed, as one court recently stated:

> The *requirement that every sovereign, state or federal,* recognize immunity granted by another sovereign, *Murphy* v. *Waterfront Commission,* [*supra,*] protects appellant from the use of his grand jury testimony in any state prosecution (emphasis added).

In re Bianchi, 542 F.2d 98, 101 (1st Cir. 1976).

B. The Petitioner's Sixth Amendment Claim

Petitioner contends that the prosecutor violated his Sixth Amendment right to counsel by refusing to allow him to consult with his attorney outside the grand jury

* Petitioner cites *Zicarelli* v. *New Jersey Commission,* 406 U.S. 472 (1972), as authority for the proposition that his immunity in New York could not shield him from prosecution in New Jersey. Petition, at 7. *Zicarelli* is inapposite. There, the Court indicated that the protection of immunity afforded by a state of the United States could be inadequate to protect a person who, by his compelled testimony, might subject himself to prosecution in a foreign country where the Fifth Amendment is not recognized. The State of New Jersey is not a foreign sovereign. It must observe the protection afforded by the Fifth Amendment and the ruling of the Court in *Murphy,* as must New York.

chamber near the conclusion of his testimony. This argument is also meritless. Assuming *arguendo* that the prosecutor had improperly rejected petitioner's request to see his attorney, *United States* v. *Mandujano, supra,* shows here also that petitioner was not thereby granted a license to commit perjury. *See, Bryson* v. *United States, supra; United States* v. *Apfelbaum, supra; United States* v. *Mandujano, supra.* To repeat what is stated above with respect to petitioner's Fifth Amendment claim, petitioner should have resorted to the court had he believed that his rights were being violated.

Further, even if petitioer's right to counsel had been violated near the conclusion of the grand jury proceeding, the facts show that he did not request to see his lawyer until he already had uttered 54 of the 55 statements which were assigned as perjurious in the three count indictment brought against him. The one perjurious statement which he made after he requested to see his attorney is contained in the second count of the indictment, and is merely cumulative of other statements assigned as perjurious in that very count. Obviously a violation of petitioner's Sixth Amendment right, had it occurred, would have an impact only upon the second count. Petitioner's convictions on counts one and three, and his concurrent sentences of imprisonment on each of those counts, would remain unaffected. In any event, the facts of this case show that the petitioner has no colorable Sixth Amendment claim.*

* It appears that petitioner requested to see his lawyer merely because he thought that the grand jury session had lasted too long. He did not object to any of the questions asked of him either before or after he made the request.

C. The Petitioner's "Perjury Trap" Claim

Petitioner's third and last argument is that the prosecutor did not call him before the grand jury to obtain information useful to its investigation of corruption in the New York nursing home industry. Rather, argues the petitioner, the prosecutor intended nothing more than to set the stage for a "perjury trap," in violation of petitioner's right to due process.

The facts of this case clearly show that petitioner, a supplier of goods to nursing homes, was called before the grand jury because he had admitted to Ira Feinberg, a nursing home operator who was cooperating with New York State's investigators, that he gave kickbacks to some of his customers. Petitioner's business consisted of supplying goods to nursing homes. Most of his nursing home customers are located in New York. The fact that the conversation took place in New Jersey did not prevent the grand jury, which was investigating the prevalence of that abuse in New York, from attempting to learn from the petitioner whether any of the recipients of his kickbacks were New York nursing homes. A grand jury may investigate events occurring outside of its jurisdiction if those events might possibly shed light upon the commission of crimes within its jurisdiction. *Blair* v. *United States,* 250 U.S. 273, 282-83 (1919). Because the grand jury was conducting a valid investigation, and because the petitioner's testimony was undoubtedly relevant to that investigation, the petitioner's perjury trap argument cannot survive. *See, Masinia* v. *United States,* 296 F.2d 871 (8th Cir. 1961).

Moreover, it is clear that petitioner was treated fairly during his appearance before the grand jury. The prosecutor warned him at the commencement of the session that he had evidence which indicated petitioner's involvement in kickback deals with nursing home customers. The prosecutor also warned petitioner on several occasions that he could be prosecuted for perjury if he lied. The prosecutor then repeatedly directed petitioner's attention to his conversation with Feinberg by framing his questions with the very same words which petitioner and Feinberg had used during their conversation.* The prosecutor's intent undoubtedly was to abide by his responsibility to jar and prod petitioner's memory, in order to bring him back to the mark with probing questions and to attempt "to flush out the whole truth." *Bronston* v. *United States,* 409 U.S. 352, 359 (1973). Lastly, at the close of the petitioner's grand jury testimony, the prosecutor made one final effort to get the truth from the petitioner by giving him an opportunity to recant or amend his testimony. Petitioner refused to do so. From the foregoing it is evident that the prosecutor was interested in obtaining the truth and that the petitioner was determined to lie.

---

* The prosecutor did not play for the petitioner, in advance of his testimony, the tape recording of his conversation with Feinberg. Clearly there was no obligation for him to do so. *See, United States* v. *Del Torro,* 513 F.2d 656 (2nd Cir.), *cert. denied,* 423 U.S. 826 (1975); *United States* v. *Winter,* 348 F.2d 204 (2nd Cir.), *cert. denied,* 382 U.S. 955 (1965); *United States* v. *Camporale,* 515 F.2d 184, 189 (2nd Cir. 1975). In fact, one of the petitioner's attorneys conceded at trial that the prosecutor had no obligation to give the petitioner access to the tape recording prior to the grand jury session. Whether the petitioner recollected this conversation when he testified before the grand jury was a question of fact which the trial jury resolved against him.

Conclusion

The petition should be denied.

Respectfully submitted,

CHARLES J. HYNES
Deputy Attorney General
State of New York
Attorney for Respondent
270 Broadway
New York, New York 10007
(212) 488-5767

RICHARD D. CARRUTHERS
Special Assistant Attorney General
Of Counsel